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No. 14-571

In the Supreme Court of the United States

APRIL DEBOER, *ET AL.*,

Petitioners,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

1. Does the Fourteenth Amendment to the U.S. Constitution preclude the people of a State from defining marriage as the union of one man and one woman?

2. Whether a "domestic-relations exception" to federal jurisdiction deprived the lower federal courts of subject-matter jurisdiction over this litigation?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. Eagle Forum participated as *amicus curiae* in the Sixth Circuit in this litigation,

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; the parties have lodged blanket letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

as well as in other related appellate proceedings on same-sex marriage both in this Court and in the Courts of Appeals. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

In 2004, Michigan's voters amended their Constitution to define marriage as "the union of one man and one woman." MICH. CONST. art. I, §25. The plaintiffs are a Michigan same-sex couple who have sued Michigan's Governor and Attorney General (collectively, "Michigan") to invalidate that definition and to allow same-sex marriages.

In Michigan, "the common law prevails except as abrogated by the Constitution, the Legislature, or [the Michigan Supreme] Court." *People v Stevenson*, 416 Mich 383, 389; 331 N.W.2d 143 (Mich. 1982). As with most American jurisdictions, Michigan's common law was adopted from the English common law, *In re Receivership of 11910 S Francis Rd*, 492 Mich 208, 219; 821 N.W.2d 503 (Mich. 2012), and Michigan therefore naturally looks to English cases as authoritative on common-law issues. *People v Duffield*, 387 Mich 300, 314; 197 N.W.2d 25 (Mich. 1972). In English common law, marriage was defined as "the voluntary union for life of one man and one woman, to the exclusion of all others." *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 343, 798 N.E.2d 941 (Mass. 2003) (*quoting Hyde v. Hyde*, [1861-1873] All E.R. 175 (1866)). Thus, the definition of marriage in Michigan has always been the current definition.

Rather than changing the definition of marriage, Michigan's constitutional amendment in 2004 merely

prevents Michigan's Supreme Court and Legislature from changing the definition of marriage. The People of Michigan reserved that right when they adopted their initial Constitution, and this Court has upheld their right to make such changes. *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1636-37 (2014). The parties thus implicitly present the question whether the Fourteenth Amendment allows federal judges to impose same-sex marriage on the states, taking the question out of the hands of the People of Michigan.

Although it supports Michigan on the merits of that question, *amicus* Eagle Forum files this brief to address the related question of *which judges* should weigh the question. Reflecting our federal structure, in which the states remain sovereign in the spheres not delegated to the Federal Government, this Court has long recognized a "domestic-relations" exception to federal jurisdiction:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

In re Burrus, 136 U.S. 586, 593 (1890). Further, this Court previously had "disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce, ... either as an original proceeding in chancery or as an incident to divorce *a vinculo*." *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859); *accord Baugh v. Baugh*, 37 Mich. 59, 61 (Mich. 1877) ("a general grant of equity jurisdiction does not cover divorce proceedings: the federal courts declaim divorce jurisdiction") (*citing Barber*). That

exception has both a statutory and a constitutional component, and it concerns both where litigation starts and where it ends. As explained below, this litigation may present only the statutory question of where litigation starts – *e.g.*, state or federal court – without addressing whether this Court has power to intervene in such cases under the Constitution.

Constitutionally, there is a question as to the scope of the judicial power conveyed to federal courts (including this Court) by Article III, §2:

> The judicial power shall extend to all cases, *in law and equity,* arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, §2 (emphasis added). The uncertainty lies in the term of art "cases in law and equity," which did not include marriage-related issues when the states ratified the Constitution. Specifically, cases at law were heard before the Court of King's Bench or the Court of Common Pleas, and cases in equity were heard before the Court of

Exchequer or the Court of Chancery. In 1787, only Ecclesiastical Courts could hear marriage-related cases: "upon the separation of the ecclesiastical courts from the civil[,] the ecclesiastical [was] supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage." *Reynolds v. U.S.*, 98 U.S. 145, 165 (1878); *accord Barber*, 62 U.S. at 597; *cf. Maynard v. Hill*, 125 U.S. 190, 206 (1888). Although *amicus* Eagle Forum raises this issue, the Court need not decide it in deciding *this case* because the statutory issue likely resolves the jurisdictional question presented.

The statutory and constitutional questions pose the same etymological issue, but the statutory one focuses not on the outer limits of the federal judicial power but on the limits that Congress intended when it created the lower federal courts. Of course, the two are not the same thing. The "Article III ... power to hear cases 'arising under' federal statutes... is not self-executing," and Congress need not provide the lower federal courts with the full scope of judicial power that Article III makes available to this Court. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807 (1986). At least initially, all relevant acts of Congress to provide jurisdiction to the lower federal courts were limited to actions at law or in equity, *see* Section II, *infra*, and this Court has held that Congress did not intend the 1948 modernization of that text to confer additional powers not already conferred: "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products*

Corp., 353 U.S. 222, 227 (1957).[2] What Congress meant by "law and equity" excluded marriage-related cases, even if this Court subsequently finds that that same phrase in Article III includes them:

> Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant.

Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992). The Court in *Ankenbrandt* suggests a narrowing of the domestic-relations exception to cases "involving the issuance of a divorce, alimony, or child custody decree," but not to torts such as fraud. *Id.* at 704. As far as it goes, that distinction supports including the right to marriage in the domestic-relations exception (an issue that *Ankenbrandt* had no reason to decide), in contrast to recognized federal jurisdiction over torts at law and in equity.

Under the foregoing analysis, it appears that limitations on the lower federal courts' jurisdiction require plaintiffs to begin their challenges to state marriage laws in state courts, which have general jurisdiction over these issues. Importantly, denying a federal forum for this suit would not deny all relief, insofar as plaintiffs could bring these federal claims in state court under the doctrine of concurrent jurisdiction. *Haywood v. Drown*, 556 U.S. 729, 735

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[2] *See also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (repeals by implication disfavored); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 128 (1985) ("absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision").

(2009). The question of whether this Court would have jurisdiction under Article III to hear an appeal from a state court likely must await a petition for a writ of *certiorari* from a state court judgment.

However the Court *answers* the constitutional and statutory questions, it is critical for the judiciary to *ask* these questions about the scope of judicial authority. As this Court has stated often in analogous Article III contexts, these questions go to the proper role of courts in our democracy:

> In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation "is founded in concern about the proper – and properly limited – role of the courts in a democratic society."

Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009) (*quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) ("we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction"). *Amicus* Eagle Forum respectfully submits that our federal structure requires the same judicial introspection.

STATEMENT OF FACTS

The facts are not in dispute. Plaintiffs are a same-sex Michigan couple who wish to marry. While it adopts the facts as stated by Michigan, Resp.'s Br. at 5, *amicus* Eagle Forum also notes that Plaintiffs' complaint alleged jurisdiction under both 28 U.S.C. §1331 and 28 U.S.C. §1343. First Am. Compl. ¶6.

SUMMARY OF ARGUMENT

Article III of the Constitution and the initial statutes that provided the lower federal courts with subject-matter jurisdiction are limited to cases in law and equity, which at the time of their drafting did not include marriage-rights case. Instead, marriage and related domestic-relations issues fell within the exclusive jurisdiction of the Ecclesiastical Courts at the time that the Framers drafted the Constitution and the first Congress created the lower federal courts. Although Congress dropped the statutory law-and-equity phrasing in 1948, this Court already has held that Congress did not intend those amendments to confer additional jurisdiction on federal courts. At a minimum, therefore, actions like this that seek the right to marry are outside the jurisdiction of the lower federal courts, and this Court has the duty to consider the lower courts' subject-matter jurisdiction. For that reason, this Court should supplement the question that the parties present to this Court with an additional question on the lower court's subject-matter jurisdiction.

ARGUMENT

I. THE DOMESTIC-RELATIONS EXCEPTION TO FEDERAL JURISDICTION APPLIES HERE

Under the court structure in England at the time that the Framers drafted Article III and Congress defined the lower federal courts' subject-matter jurisdiction, the question of what constituted a legal marriage was neither a case at law nor a case in equity. Since those law-and-equity limits continue to apply directly under the Constitution, U.S. CONST. art. III, §2, and indirectly under the grants of jurisdiction to the lower federal courts, *Fourco Glass*, 353 U.S. at 227; Section II, *infra*, the "domestic-relations exception" to federal jurisdiction – which this Court has long recognized – denies jurisdiction here. *Burrus*, 136 U.S. at 593; *Barber*, 62 U.S. (21 How.) at 584; *Baugh*, 37 Mich. at 61. Accordingly, there is ample basis for this Court to remand with instructions to dismiss the complaint without prejudice, so that the plaintiffs can commence their suit in state court under the doctrine of concurrent jurisdiction. *Haywood*, 556 U.S. at 735. That result would be consistent with *Baker v. Nelson*, 409 U.S. 810 (1972), this Court's prior review of same-sex marriage, which the Court found not to present a substantial federal question.

The domestic-relations exception's application here may not foreclose this Court's hearing an appeal from a state court on the scope of the Fourteenth Amendment. Article III's scope is more broad than §1331's scope. *Compare, e.g., Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) *with Am.*

Well Works v. Layne, 241 US 257, 259-60 (1916); *cf. Merrell Dow Pharm.*, 478 U.S. at 807. Moreover, other marriage-related cases would fall within the law-equity categories, even if a pure marriage-rights case does not. For example, *Loving v. Virginia*, 388 U.S. 1 (1967), arose from a criminal action appealed from a state supreme court, *Loving v. Commonwealth*, 206 Va. 924, 925, 147 S.E.2d 78 (Va. 1966), and *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), reached this Court from a federal district court action brought under 28 U.S.C. §1346(a)(1). In both cases, the suit was in equity (*Loving*) or law (*Windsor*), and the petitioner Loving and plaintiff Windsor did not seek the right to marry, having married under another jurisdiction's laws that implicated rights vis-à-vis the respondent Virginia and defendant United States. Accordingly, it is likely that a case eventually – or even soon – will reach this Court on the merits question that the parties ask this Court to decide.

Another group of this Court's decisions touch upon domestic-relations issues on direct review from state court systems under 28 U.S.C. §1257, with no discussion – for or against – a domestic-relations exception to Article III jurisdiction under the Constitution. For example, *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984), reviewed the "judgment of a state court divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race." *See also Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (California Court of Appeal); *Troxel v. Granville*, 530 U.S. 57 (2000) (Supreme Court of Washington); *Adoptive Couple v. Baby Girl*,

133 S.Ct. 2552 (2013) (Supreme Court of South Carolina). In all of these decisions, the Court simply did not discuss a domestic-relations limit on Article III jurisdiction, which proves nothing.

> The short of the matter is that the jurisdictional character of the elements of the cause of action in [*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987)] made no substantive difference ..., had been assumed by the parties, and was assumed without discussion by the Court. We have often said that drive-by jurisdictional rulings of this sort ... have no precedential effect.

Steel Co., 523 U.S. at 91. As such, these merits decisions do not rebut a domestic-relations exception to Article III jurisdiction.

II. THE LOWER FEDERAL COURTS LACK JURISDICTION OVER MARRIAGE-RIGHTS CASES

The fact that virtually all currently practicing lawyers assume that federal-question jurisdiction is available for any federal claim does not make it so. As Justice Holmes recognized in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), sometimes "a page of history is worth a volume of logic." Until 1875, the lower federal courts did not have federal-question jurisdiction. *Merrell Dow Pharm.*, 478 U.S. at 807: Indeed, until 1980, federal-question jurisdiction itself had an amount-in-controversy requirement that likely would have precluded suits over marriage rights under §1331. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977) (*citing* Pub. L. No.

94-574, 90 Stat. 2721 (1976)) (eliminating amount-in-controversy minima for suits against federal agencies and officers); Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980) (same for other suits). As these historical examples demonstrate, unexamined assumptions cannot and do not accurately define the bounds of the lower federal courts' jurisdiction. As creatures of statute, the lower courts have only the jurisdiction that Congress gave them, which need not extend to the full limits – whatever they may be – of the judicial power under Article III.

By way of background, a plaintiff without a statutory right of action who seeks to enforce federal law against a conflicting state law can consider two alternate paths, 42 U.S.C. §1983 and the *Ex parte Young* exception to sovereign immunity:

> [T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference.

Perez v. Ledesma, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343. *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. §1331. *Id.* In both statutes, however, Congress adopted the phrasing of Article III by extending jurisdiction only to "suits at law or in equity." *Id.* As indicated, the revision of the phrase to "civil actions" in 1948, 28 U.S.C. §§1331, 1343, did not expand the scope of the jurisdiction conferred on the lower federal courts. *Fourco Glass*, 353 U.S. at 227; *Nat'l Ass'n of Home Builders*, 551

U.S. at 662; *Chem. Mfrs. Ass'n*, 470 U.S. at 128. At the very least, the domestic-relations exception poses a serious question about the jurisdiction of the courts below.

As this Court has recognized, federal courts must resolve jurisdiction before resolving the merits:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95 (1998) (interior quotations, citations, and brackets omitted). If it reviews this case – or any other same-sex marriage case – this Court should direct the parties to address the question of jurisdiction.

Finally, this Court should not assume that the failure of Congress to expand federal-question and civil-rights jurisdiction under §1331 and §1343 has been a mere oversight that this Court might overlook in the interest of perceived justice to the plaintiffs' federal claims. The Constitution establishes a federal structure of dual state-federal sovereignty, *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990), which the states entered with their retained "sovereignty intact."

Fed'l Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 751-52 (2002); U.S. CONST. amend. X. While the Sixth Circuit appropriately allowed Tennessee, Michigan, Kentucky, and Ohio to appear before the same panel on the same day to defend their marriage laws, other circuits have not provided their states the same luxury. Due primarily to the variable timings of litigation in various states, South Carolina now must defend her laws before a Fourth Circuit that already has resolved the constitutional issue against court clerks from Virginia. If, instead, this type of litigation had to begin in state court, each state would proceed in its own courts before the final review, if any, in this Court. *Amicus* Eagle Forum respectfully submits that that procedure would prove markedly more consistent with the Eleventh Amendment and our federal structure than allowing these suits to begin in the lower federal courts.

CONCLUSION

If it grants the petition for a writ of *certiorari*, this Court should include a Question Presented on the lower federal courts' subject-matter jurisdiction to hear the same-sex marriage claims at issue here.

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